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NOS. 1161-2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

V.

LEWIS B. MAYTAG, ALTERNATE EXECUTOR OF THE ESTATE OF DENA B. MAYTAG, DECEASED, RESPONDENT.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

V.

ORA B. MAYTAG, FRED MAYTAG II, AND MARY LOUISE MAYTAG McCAHILL, EXECUTORS OF THE ESTATE OF E. H. MAYTAG, DECEASED, RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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STATEMENT.

In order to aid this Court in reaching a correct conception of the case presented, Respondents correct and amplify the statement as to the facts and the question presented, made in the Petition.

The Commissioner determined the value of the blocks of stock involved solely on the basis of the market quotations, as of the valuation dates, of Maytag Common stock on the New York Stock Exchange. He contended before

the Board that the market quotations were exclusively determinative of the fair market value, regardless of the admitted fact that the volume of sales on the stock exchange was relatively small, and that the quantity of stock in the blocks to be valued was relatively large. Consistently with the then existing Treasury Regulations (Reg. 80, 1934 Ed., Art. 13 (3); Reg. 79, 1936 Ed., Art. 19 (3)), he refused to give any consideration whatsoever to the size of the blocks of stock, and asserted before the Board that the size of the blocks of stock was an immaterial matter, and should be given no consideration whatsoever by the Board. While contending, as stated in the Petition, Page 5, that the correct concept of fair market value was "the price at which the property in question would change hands, assuming a willing seller and a willing buyer, i. e., *assuming an increase in demand equal to the supply or the quantity of the property in question*", (Italics ours) nevertheless he insisted that the Board should consider nothing but the quoted market prices on the New York Stock Exchange, and value the blocks of stock for tax purposes accordingly.

The Board accepted as correct the concept that the fair market value was "the price at which the property would change hands, assuming a willing seller and a willing buyer": but refused to arbitrarily "assume an increase in demand equal to the supply or the quantity of the property in question"; rejected the arbitrary formula prescribed by the Regulations for determination of the value of stock for estate and gift tax purposes, and proceeded to reach a determination of the fair market value of the blocks of stock involved by considering all factors and elements relevant and material to the ultimate question.

The taxpayers introduced the testimony of three expert witnesses whose qualifications as experts were unchallenged. Each of these witnesses gave his opinion that the size of the blocks of stock in question was an exceedingly

important factor in determining the price at which the blocks of stock would change hands; for the reason that, as each testified, it would have been impossible to liquidate such blocks on the New York Stock Exchange within a reasonable time without very seriously depressing the market prices; and that the only method of disposing of such large blocks of Maytag Common stock would have been to sell to a syndicate on an "off-market" transaction, at a substantial discount under the market prices. Each of these witnesses stated that the market quotations of Maytag Common stock did not fairly reflect the fair market value of the blocks of stock in question. (Rec. 159, 165, 173-4, 179, 185, 225.)

The Commissioner introduced the testimony of three expert witnesses. Two of them, (Dr. Friday and Mr. Graham) were of the opinion that the market quotations alone were not the only criterion of fair market value (Rec. 206, 249, 268-9, and 289). On cross examination, one of the Commissioner's witnesses (Merriman—Rec. 343-4) stated that the block of 133,859 shares could have been liquidated by careful market proceedings on the New York Stock Exchange within a period of six months after the valuation date, and that the block of 400,000 shares could have been disposed of in probably a year or 15 months. Another of the Commisisoner's witnesses (Graham—Rec. 225) testified that the dumping of large blocks of stock on the market has a tendency to drive the price down.

It thus appears that not only was there substantial evidence to sustain the finding of the Board that the market quotations were not the sole and exclusive criterion by which the fair market value of the blocks of stock in question should be determined, *but that all the evidence sustains the proposition without conflict.* Therefore, the Board felt free to give consideration to all relevant factors and elements bearing on the question of fair market value:

and in approving this procedure of the Board, the lower court said (125 Federal Reporter, Second Series, 55, at 63):

> "Where, as in this case, the taxpayer affirmatively shows that a block of listed stock to be valued is very great in comparison with the amounts of the stock which have been traded in on the exchange where it is listed, that the block of stock could not be sold on such market at its quoted prices within a reasonable time by skilled brokers following prudent practices for liquidation and that the true value of the block of stock is in fact different from the price quotations, then the taxpayer is entitled to have all other proper evidence of the value of the block of stock considered together with the market quotations." (Citing authorities)

* * * * * *

Adverting now to the statement in the Petition on Page 2 under the heading "Question Presented", for the purpose of commenting upon this rather ambiguous statement we quote it and italicize the objectionable phrases and words:

> "In determining for estate and gift tax purposes the value of *large blocks of stock regularly traded* in upon the New York Stock Exchange, the Board of Tax Appeals took into consideration the *potential* reduction in the market price which would result from the *artificially* depressed condition of the market if the blocks of stock were thrown upon the market at one time. The question presented is whether this *potential* effect may properly be considered as a factor in valuing the stock."

It is not true that large blocks of the Maytag Common stock were regularly traded in. The record is conclusive and to the contrary on this point. The volume of monthly and yearly sales during the years 1933, 1934 and 1935, and of daily sales during 1934, is shown in the record and reproduced in the opinion of the lower court (125 Federal Reporter, Second Series, Pages 58, 59 and 60). It is true that Maytag Common stock was more or less regularly traded in, but the volume of the daily, monthly and yearly trad-

ing was exceedingly small compared to the blocks of stock to be valued.

Petitioner uses the phrase "artificially depressed condition of the market". The evidence shows that the depression of the market prices that would follow the dumping of large blocks of stock was anything but artificial.

Petitioner refers to the "potential" effect of the offering of large blocks of stock on the market. We say that under the evidence the effect is not to be characterized merely as potential, but on the contrary as actual.

Respondents do not desire or intend to occupy the time or attention of this Court with a discussion of phraseology, but nevertheless are impelled to say that, taken by itself, the statement in the Petition that the question presented "is whether this potential effect (i. e., the result obtaining if the blocks of stock involved were thrown on the market) may properly be considered as a factor in valuing the stock", is hardly a fair statement of the question presented in these cases, and requires clarification.

The implication of the statement is that the Board determined the value of the stock by an arbitrary discount, following the theory identified by Petitioner as the "blockage theory". This is not the fact, as is readily demonstrated by an examination of the record.

Unquestionably it is true that the Board considered the size of the blocks of stock, and the testimony of the expert witnesses, including the Commissioner's witnesses, to the effect that an attempt to dispose of the blocks of stock on the New York Stock Exchange would result in depressing the market, as justifying its conclusion that the market quotations on the critical dates were not conclusive as determining the fair market value of the blocks of stock involved.

The Commissioner, asserting the Board was wrong in refusing to accept the market quotations as final and con-

clusive on the question of fair market value, asked the lower court to review the decision of the Board on this point alone. The question at issue before the lower court was clearly recognized in the Commissioner's argument, and by the lower court. We quote from its opinion (125 Fed. (2d) at 61):

> "The contention of the Commissioner on this review is that the Board applied an erroneous method resulting in erroneous conclusion that the value of the two blocks of stock was less than the prices at which the stock was regularly bought and sold on the open market of the New York Stock Exchange."

Also from Page 62:

> "In support of his position that the market quotations on the stock made available to the Board constituted 'primary' or 'best' evidence of the value, and that the production of such evidence rendered the opinion and other evidence considered by the Board inadmissible * * *"

And in passing upon the question, the lower court made the statement (opinion Page 63) already quoted on Page 4 of this Brief.

It is not asserted by the Petitioner that the evidence, upon which the Board based its conclusion that the quoted market prices alone should not be held determinative of the fair market value of the blocks of stock involved, was not legally sufficient to sustain the finding of the Board. Petitioner claims merely that the Board should not have given any consideration to such evidence, or to any evidence other than that which established the quoted market prices.

So it appears that the question presented is this:

Did the lower court err in holding that under the circumstances established by the evidence in these cases, the taxpayer is entitled to have all evidence of the value of the stock considered together with the market quotations?

POINTS.

I.

No method of determining fair market value can be stated which will adequately meet all circumstances. Fair market value is a question of fact and all evidence tending to establish it should be considered.

Philips v. Com'r., 12 Fed. (2d) 598.
Helvering v. Safe Deposit and Trust Co., 95 Fed. (2d) 806.

II.

An inflexible mathematical formula promulgated by the Commissioner of Internal Revenue, commanding determination of a question of fact arising under a statute in accordance with the prescribed formula, is not binding on either the Board of Tax Appeals or the Courts: particularly when it is made to appear that the rule of the formula operates in disharmony with the plain intent of the statute, and contrary to the facts.

Helvering v. Safe Deposit and Tr. Co., 95 Fed. (2d) 806.
Manhattan General Equipment Co., 297 U. S., 129, 134; 80 L. Ed. 528.
And see, generally, authorities cited under III and IV, *infra.*

III.

The Board of Tax Appeals found as a fact that the size of the blocks of stock to be valued was an important factor in connection with the determination of the fair market value thereof. There is abundant evidence in the record to support the inference and sustain the finding. In fact, any other conclusion would be contrary to the evidence.

Such a determination of fact supported, by legally sufficient evidence, may not be disturbed by the courts.

Powers Mfg. Co. v. Com'r. (C. C. A. 8), 34 Fed. (2d) 255.
Cass v. Helvering (C. C. A. 8) 83 Fed. (2d) 841.
Helvering v. Kimberly, 97 Fed. (2d) 433.
Com'r v. Shattuck, 97 Fed. (2d) 790.
Com'r v. Gamble, 101 Fed. (2d) 565.
Tracy v. Com'r (C. C. A. 6) 53 Fed. (2d) 575.
Helvering v. Rankin, 295 U. S. 123, 131, 79 L. Ed. 1343, 1349.
Elmhurst Cem. Co. v. Com'r, 300 U. S. 36, 40; 81 L. Ed. 491, 492.
Helvering v. National Groc. Co., 304 U. S. 282, 82 L. Ed. 1347, at 1356-7.
Helvering v. Washburn, 99 Fed. (2d) 478.
Tate v. Commissioner, 97 Fed. (2d) 658.
Randolph et al. v. Commissioner, 76 Fed. (2d) 472.
Palmer v. Commissioner, 302 U. S. 63, 82 L. Ed. 50.
And see annotated cases, 117 A. L. R. 149.

IV.

The procedure and methods followed by the Board in these cases, and approved by the lower court, have been uniformly and unanimously approved by all the Federal Courts that have passed on the question. See, among others,

Helvering v. Maytag, 125 Fed. (2d) 55.
Helvering v. Safe Deposit & Tr. Co., 4 Cir., 95 Fed. (2d) 806.
Bull v. Smith, 2 Cir., 119 Fed. (2d) 490.
Grant Co. v. Duggan, 2 Cir., 94 Fed. (2d) 859.
Commissioner v. Shattuck, 7 Cir., 97 Fed. (2d) 790.
Gamble v. Commissioner, 6 Cir., 101 Fed. (2d) 565, cert. den. 306 U. S. 664.
Doric Apartment Co. v. Commissioner, 6 Cir., 94 Fed. (2d) 895.
DuPont v. Deputy, 26 Fed. Supp. 773.
Groff v. Smith, 34 Fed. Supp. 319.
Hazeltine Corp. v. Commissioner, 3 Cir., 89 Fed. (2d) 513.
Helvering v. Kimberly, 4 Cir., 97 Fed. (2d) 433.
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Page v. Howell, 5 Cir., 116 Fed. (2d) 158.
Richardson v. Helvering, App. D. C., 80 Fed. (2d) 548.
Rogers v. Helvering, 2 Cir., 107 Fed. (2d) 394.
Roth v. Wardell, 9 Cir., 77 Fed. (2d) 124.
Heiner v. Crosby, 24 Fed. (2d) 191.

V.

Upon the merits it seems impossible to justify petitioner's contention that in these cases the market quotations, *as such*, should be held as conclusive in establishing the fair market value of the blocks of stock, notwithstanding that, as has been held, they sometimes normally constitute strong evidence, and in a proper case, could justify the inference that they are determinative.

It is obvious that the market quotations of a stock dealt in on the New York Stock Exchange represent from day to day merely the value of the stock in the minds of the traders. But the traders on a stock exchange are not the ones who are to decide the fair market value of stock for tax purposes. This determination is remitted to the Board of Tax Appeals, in the last analysis. It is true that if a stock is regularly traded in on an exchange, there may arise an assumption that the exchange affords a market wherein there are sufficient willing buyers to purchase the stock that is required to be valued, at the market prices: so, if the evidence does in fact establish that the exchange affords a market upon which the stock could be disposed of at the current market quotations, then obviously the quotations afford the best criterion of value; not because the traders think that the quotations do represent the fair market value, but simply because the fact is then established that the stock can readily be disposed of at the known price; that is, the buying demand equals the supply. On the contrary, and in a case where it is made to appear that the exchange would not present sufficient willing buyers at the

quoted market prices, the quotations surely cannot be held as exclusively determinative of a fair market value, which according to all judicial precedent and common experience and knowledge is a question of fact, and as such to be decided in accordance with the greater weight of all the evidence, and not in accordance with the fluctuating opinions of traders on a stock exchange.

CONCLUSION.

However obliquely the point is approached in the Petition, the fact is that Petitioner is seeking to have this Court declare that in the case of a listed stock the market quotations on the valuation date must be accepted as conclusive and as the sole criterion to be used in determining the fair market value of *all* the stock of that particular issue on the critical date, and that in the case of a listed stock all inquiry as to its fair market value for tax purposes is foreclosed excepting only the ascertainment of the market prices on the exchange that the stock is principally dealt in.

In its practical application, the proposition for which the Commissioner contends means that, because on a certain date 100 shares of the stock in question is sold on the New York Stock Exchange at a certain price per share, any number of shares could be disposed of on that same day *and at the same price.* In short, that without exception it must be assumed that always there will be an increase in buying demand sufficient to absorb the quantity of the stock, however great, that is offered for sale.

This, indeed, is a violent assumption, quite contrary to common knowledge and experience, and certainly, in these cases, contrary to all the evidence.

It is an assumption that the Board of Tax Appeals has consistently refused to entertain: and every court that

has passed upon the question during the period of for more than twenty years has affirmed the position of the Board, nor has the Board or any court ever held to the contrary, so far as we can ascertain. Notwithstanding, Petitioner contends here (Pet., Page 12) that "in valuing a large block of stock, therefore, *it must be assumed that there is a demand for that stock equivalent to its supply.*" (Italics ours.)

Respondents concede that the market quotations of a listed stock may normally justify the presumption (rebuttable, of course) that they establish its fair market value; and that whether or not such quotations are accepted as conclusive, they are always a factor to be considered. Respondents also concede that the determination of the value of stock for estate or gift tax purposes by the Commissioner raises a presumption (also rebuttable), of validity. Respondents also concede that the true measure of "fair market value" of property is the price in money at which such property would change hands in a transaction between a willing buyer and a willing seller. The ultimate question is always, for how much money can the property be disposed of?

No one would deny that where it is established, *as a fact,* that the quantity of property to be valued could readily be sold at an ascertained price, that price is at least the minimum to be set as the fair market value. So where it is made to appear that the quantity of stock involved could be readily disposed of on the exchange at the quoted prices; or, perhaps to state it more correctly, *where it is not made to appear that the stock could not be disposed of at the quoted market prices,* then the market prices should be held controlling, at least as indicating the minimum fair market value.

But the corollary proposition is equally sound: that is, where it is made to appear that the stock to be valued *cannot* be disposed of at the quoted market prices, then certainly those prices are not conclusive as determining the minimum fair market value.

It is true, as stated in the Petition under Point 4, Page 13, that the Board's final determination of value was made upon all the evidence and that the final determination of values was not based on the proposition that the value of the block of stock should be arbitrarily discounted because of the so-called "blockage theory". The evidence as to the fair market value of the stock is voluminous and covers a very wide and complete field of investigation. It would serve no useful purpose and would doubtless be improper to detail that evidence here. It is in the record and it was carefully examined by, and is restated in the opinion of the court below. The final determination of values was based upon and is abundantly sustained by the evidence as to value; and was not, as apparently petitioner would have this Court believe, based merely on some arbitrary "blockage" discount. As previously pointed out, the refusal of the Board to accept the market quotations as conclusive had nothing whatever to do, directly, with the final determination of values.

Having rejected the contention of the Commissioner, that the market quotations are to be taken as conclusive, regardless of substantial evidence rebutting that assumption, and that the quantity of the stock to be valued should be given no consideration, the Board felt free, and was free to give consideration to all relevant factors, including, of course, the market quotations themselves. So far as the opinion evidence is concerned, the testimony of the witnesses developed a range, as to value, of from approximately $2.00 per share up to $5.00. Final figures of valuations as fixed by the Board were well within this range.

We direct the attention of the Court to the fact that in these cases there is no complaint concerning the value for tax purposes of the blocks of stock involved or concerning any other action of the Board, excepting only that it gave consideration to the testimony establishing the size of the blocks of stock as a relevant factor.

Neither is it claimed by Petitioner that there is any conflict in the decisions of the Circuit Courts of Appeal that have passed upon the question. Indeed, such a claim could not well be made and certainly could not be supported, because it would be contrary to the facts. Petitioner barely hints, not that there is a conflict, but that there is "confusion" resulting from the decisions in the cases referred to under Paragraph (2) commencing Page 9 of the Petition. But an examination of the opinions in those cases fails to sustain any slight aspect of confusion among the Circuit Courts of Appeal. Consideration by the Board of Tax Appeals of the size of the block of stock to be valued was by implication, at least, and perhaps definitely approved in the *Phipps* case and in *Gamble vs. Commissioner, Roth vs. Wardell,* and *Richardson vs. Helvering,* referred to in the Petition, Page 10. With reference to these cases, Petitioner states "while perhaps no square conflict exists between these cases and the decision of the court below, it is submitted that they cannot be reconciled in principle. If the blockage theory is valid at all, it would seem that it must be applied in all cases where the block of stock is sufficiently large to make it likely that its immediate disposition would depress the market. * * *"

Comparison of the opinions in the cases referred to by Petitioner, with the opinion of the lower court in these cases and with the opinions of the other Circuit Courts dealing with the question, will, indeed, establish that there is no conflict. In the *Gamble, Roth* and *Richardson* cases, the

court simply held that although it was proper for the Board to consider the size and quantity of the blocks of stock to be valued, and the opinion evidence to the effect that the attempted disposition of these blocks would depress the market, nevertheless the courts approved the action of the Board in refusing to be bound by such testimony where, in the opinion of the Board, the weight of the testimony justified another conclusion.

It is idle to argue, as Petitioner does, that what he terms to be the "blockage theory" must always be applied by the Board, or that it is a method of proof that it is always to be considered conclusive. As stated in *Phillips vs. Commissioner, supra,* "No method of determining fair market value can be stated which will adequately meet all circumstances." And as stated by the Circuit Court of Appeals, 4th Circuit in *Helvering vs. Safe Deposit and Trust Company,* whether or not the size of the block of stock affects value is a matter of evidence and not of doctrinaire assumption.

Respondents do not claim and never have claimed that the Board of Tax Appeals must consider the size of a block of stock as a controlling factor. Respondents do contend that where there is competent evidence before the Board, sustaining the proposition that the size of a block of stock to be valued is a relevant factor, that in such a case the Board should give consideration to the fact, although always the weight or value of the fact and the inferences to be drawn therefrom are solely for the Board to determine.

* * * * * *

For the reasons stated and upon the authorities cited in this Brief it is respectfully submitted that the Petition for Writs of Certiorari should be denied.

R. L. READ,
J. G. GAMBLE,
Attorneys for Respondents.
Address: 500 Bankers Tr. Bldg.
Des Moines, Iowa.

GAMBLE, READ, HOWLAND & ROSENFIELD,
500 Bankers Trust Building,
Des Moines, Iowa,
Of Counsel.